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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-366

TIDEWATER OIL COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,
Respondents.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

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No. .....

TIDEWATER OIL COMPANY,
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vs.
UNITED STATES OF AMERICA and
PHILLIPS PETROLEUM COMPANY,
Respondents.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

Tidewater Oil Company prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit in *Tidewater Oil Company,* Defendant-Petitioner vs. *United States of America,* Plaintiff-Respondent, and *Phillips Petroleum Company, Defendant-Respondent,* No. Misc. 5741.

OPINION

The opinion of the court below is not yet reported. It is set out in Appendix A hereto.

All emphasis in quotations has been added, unless otherwise stated.

No formal opinion was rendered by the district court, but pertinent excerpts from the reporter's transcript of its oral remarks are set out in Appendix E hereto. An earlier opinion on another phase of the case is reported, *United States v. Phillips Petroleum Company and Tidewater Oil Company*, 1966 Trade Cas. ¶ 71,872.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254. The district court had jurisdiction under the Clayton Act, §§ 7 and 15, Act of October 14, 1914, c. 323, 38 Stat. 736, as amended, 15 U.S.C. §§ 18 and 25.

The jurisdiction of the Court of Appeals is the question in issue, under 28 U.S.C. §1292(b). Its order was rendered July 28, 1971.

QUESTION PRESENTED

In a civil action brought in a district court by the United States under Section 7, Clayton Act, (15 U.S.C. § 18), does a Court of Appeals have jurisdiction to entertain a petition for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) from an order of the district court which certifies that it involves a controlling question of law as to which there is substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation?

The right to appeal to a Court of Appeals under 28 U.S.C. 1292(a) — as distinguished from 1292(b) — is not involved.

STATUTES INVOLVED

Section 7, Clayton Act, Act of Oct. 14, 1914, c. 323, 38 Stat. 736, as amended, 15 U.S.C. § 18:

> "* * * no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the

country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

28 U.S.C. § 1292(b) (Interlocutory Appeals Act, 1958):

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

The Expediting Act of 1903, Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, as amended (15 U.S.C. § 29):

"In every civil action brought in any district court of the United States under any of said [Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

STATEMENT OF THE CASE

This petition concerns reviewability of an order denying a party's motion to dismiss where keeping it in or letting it out will drastically change the progress of the case. Denying the motion, the district court volunteered that it would certify its order for appeal, saying:

"* * * I do recognize that the course of the trial will depend upon the correctness of my ruling.

"And therefore I will issue an order making my ruling appealable.

* * *

"Because if you are in that is one type of a lawsuit and if you are out that is another kind of lawsuit."

In March, 1966, petitioner ("Tidewater") contracted with respondent Phillips Petroleum Company ("Phillips") to sell to Phillips certain western assets on June 30, 1966. At the request of the Antitrust Division of the Department of Justice, Tidewater and Phillips voluntarily postponed the consummation to 7 A.M. (P.D.T.), July 14, 1966. On July 13, 1966, the United States filed a complaint in the district court in Los Angeles against Phillips and Tidewater, assailing the proposed acquisition by Phillips as violative of Section 7 of the Clayton Act, and plaintiff applied to the court for a temporary restraining order against the consummation of the transaction pending hearing on a motion for preliminary injunction.

Because of absence of the judge to whom the case had been assigned, the application could not be heard until after the hour set for consummation the next day. However, Tidewater and Phillips, "in deference to the Court, delayed the closing of the transaction pending the Court's judicial determination". The court "denied the requested restraining order, thus permitting the transaction to be closed". Later, after receipt of extensive evidence, plaintiff's motion for a preliminary injunction was denied with opinion (1966 Trade Cas. ¶ 71,872) and upon a full set of findings.[1]

Restraint having been denied, Tidewater sold the agreed assets and transferred title to Phillips. The case then proceeded as one to compel divestiture by Phillips of the acquired assets, and Tidewater was wholly inactive in the case except to respond to plaintiff's discovery.

In April, 1971, plaintiff informed the district court that it had completed its discovery and was ready to go to trial. Thereupon Tidewater moved to dismiss, as against it,[2]

> "on the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the

1. Those findings are set out in App. C. hereto and are the source of the facts stated above.

2. The motion is set out in App. D. hereto.

seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate."[3]

The district court denied the motion, and its formal order (App. B hereto) included the certification for interlocutory appeal under 28 U.S.C. § 1292 (b). Within the time provided by that section, on June 30, 1971, Tidewater filed its petition in the court below for permission to appeal under 1292(b).

On July 28, 1971, the court below denied the petition by an order and opinion of one sentence. Omitting the caption, it reads thus:

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3. The proposition asserted in support of the motion is sustained by the authorities:

Dailey v. Quality School Plan, Inc., 380 F.2d 484, 488 (5 Cir. 1967):

"The argument is that § 7 is directed against the acquiring corporation only and not against the seller. This position is well taken. § 7 by its terms proscribes only the acquiring corporation. * * * the language of the statute is clear. We thus affirm the dismissal as to Cowles on the § 7 charge."

In Re Dean Foods, Trade Reg.Rep., 1965-1967 Transfer Binder, ¶ 17,765, the Federal Trade Commission said (p. 23,116):

"* * * Bowman [the selling corporation] was not a proper party to the Section 7 charge and * * * the complaint should be dismissed as to Bowman with respect to this charge.

* * *

"It is clear under the language of this section that the Clayton Act prohibition was directed solely against the acquiring companies and did not encompass the activities of the acquired company."

Accord: *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902, 906 (9 Cir. 1968).

Handler, Annual Review of Antitrust Developments, 15 Record of the Association of the Bar of the City of New York, 362 at 387 (1960):

"The statute is clear on its face. And for once nobody disputes its clarity. No one has suggested that a seller can run afoul of Section 7. Nor is there anything in the legislative reports indicating a purpose to reach sellers."

> "The petition for leave to appeal under 1292(b) is denied. *United States v. Ford* [*sic*] *Machinery Corporation*, 9 Cir., 321 F.2d 534."

The appeal in the cited case (the correct designation of which is *United States v. FMC Corp.*, 321 F.2d 534) was "taken [by the United States] under 28 U.S.C. § 1292(a)(1) from an order denying a motion for a preliminary injunction". After stating the nature of the case and of the appeal, the opinion and order there said:

> "We are of the opinion that we lack jurisdiction of this appeal, by reason of the provisions of the Expediting Act of 1903 (c. 544, 32 Stat. 823) now 15 U.S.C. § 29. See [citations]. We are unable to agree with the contrary decision of the Third Circuit in United States v. Ingersoll-Rand Co., 1963, 320 F.2d 509 (June 5, 1963)."

The court below thus made clear that its reason for denying Tidewater leave to appeal here was *solely its belief that it lacked jurisdiction.*

REASONS FOR GRANTING A WRIT

The present petition for certiorari does not raise the question whether the court below should have granted leave to appeal. The question we present is whether it had jurisdiction to do so. Should this Court sustain that jurisdiction, the case would be remanded for the court below to act upon the merits of the petition for leave to appeal. Where a court fails to exercise a discretion reposed in it by law, as with respect to allowing an appeal, in the erroneous belief that it lacks jurisdiction to do so, this court on certiorari[4] can direct it to do so, *In re 620 Church St. Corp.*, 299 U.S. 24, 26 (1936); *House v. Mayo*, 324 U.S. 42, 44 (1945), the direction being that it render a decision not in "any

4. It could also do so by mandamus. *Work v. Rives*, 267 U.S. 175 (1925).

particular way but only that it be made one way or the other". *Work v. Rives,* 267 U.S. 175, 184 (1925); *Brown v. Fletcher,* 237 U.S. 583 (1915).

The question is an important one of federal law, it has never come before this Court, and it cries to be settled. It has never received analysis by any court, and it is inconceivable how it can ever be resolved except on a grant of certiorari in a proceeding just like this. Moreover, it was decided below solely on the basis of assumed identity with the question of appeals under 28 U.S.C. 1292(a), and, on that question, there is a conflict among the circuits. The First and Ninth[5] hold one way, and the Third another.[6] As we show below, the question of interlocutory appeals under § 1292(b) is not the same as under § 1292 (a). But if there were identity, then there is conflict among the circuits.

This Court has often observed how much its work is eased by having cases screened through the Courts of Appeal. *United States v. Ballard,* 322 U.S. 78, 88 (1944); *United States v. Sheridan,* 329 U.S. 379, 392 (1946). By the time § 1292(b) was first enacted (in 1958), doubt was growing about the wisdom of departing from that practice in antitrust cases and in routing them directly to this Court. Thus, in *United States v. Singer Manufacturing Co.,* 374 U.S. 174, 175n (1963), the Court said:

> "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. * * * Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals."

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5. *United States v. Cities Service Company,* 410 F.2d 662 (1 Cir. 1969); *United States v. FMC Corp.,* 321 F.2d 534 (9 Cir. 1963).

6. *United States v. Ingersoll-Rand Co.,* 320 F.2d 509 (3 Cir. 1963)

Expedition, it was coming to be believed, was better secured by screening cases through the Courts of Appeals.[7]

While courts cannot create a jurisdiction not created by Congress, however desirable, what Congress has conferred they should not reject. 28 U.S.C. 1292(b) is a modern innovation serving the desirable purpose and enacted over 50 years after the Expediting Act. That section manifests the entirely modern view that interlocutory appeals on important issues are a useful updating of judicial administration. Yet, if no such appeal can be taken to a Court of Appeals under § 1292(b) in a government antitrust suit, that useful device is denied to government antitrust litigation, for no interlocutory appeal lies to this Court.

It is imperative to observe that two entirely different kinds of interlocutory appeals are provided by the judicial code, each with a different language, history and purpose. The first and earliest in time is covered by 28 U.S.C. § 1292(a) and relates to certain collateral proceedings in a case — orders granting or denying interlocutory injunction or relative to receiverships.[8] The second is provided for in 28 U.S.C. § 1292(b) and relates, not to collateral matters, but to important questions in the direct stream of the case,

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7. Mr. Justice Clark had made similar observations in a concurring opinion, *Brown Shoe Co. v. United States*, 370 U.S. 294, 355, 364 (1962), as had Mr. Justice Harlan in *United States v. Borden Co.*, 370 U.S. 460, 477 (1962).

8. Apart from certain patent and admiralty matters.

§ 1292(a) reads:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property:"

which, if properly determined early, will save time and energy of courts and litigants.

The history of § 1292 (a) has led some courts to deny jurisdiction of appeals under that section to Courts of Appeals in government civil antitrust actions. But the language, history and purpose of 1292(b) are totally different. And the question is whether anything in *that* language, history and purpose defeats its salutary application.

Language of § 1292(b)

The necessary place to start, if not to end, analysis is the language of the pertinent statutes.

The Expediting Act of 1903 (15 U.S.C. § 29) provides that in civil actions by the United States under the antitrust acts,

> "an appeal from the *final judgment* in the District Court will lie only to the Supreme Court."

28 U.S.C. § 1292(b) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable . . . [shall make the proper certification] * * * The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . ."

Thus, § 1292(b) by its language applies to *any* civil action, and the Expediting Act relates only to appeals from *final* judgments. Looking solely to the language of the two statutes, the Expediting Act is no bar to an interlocutory appeal under § 1292(b).

In *United States v. Cities Service Company*, 410 F.2d 662, 670n (1 Cir. 1969), the First Circuit, while holding that the Expediting Act precludes an interlocutory appeal to a Court of Appeals under 1292(a), had this to say, albeit by way of dictum, of 1292(b):

> "It is at least arguable that by its literal terms the certification procedure of § 1292(b) permits interlocutory appeals in government antitrust cases since § 1292(b) covers appeal not

> otherwise allowed by § 1292(a). *See* Comment, The Antitrust Expediting Act—A Critical Reappraisal, 63 Mich. L. Rev. 1240, 1245 n. 48 (1965). Moreover, § 1292(b) appeals do not suspend a consideration of the merits unless a stay is issued by the court of appeals. On the other hand § 1292(b) appeals would involve possible conflict with the policy that government antitrust actions are to be reviewed only in the Supreme Court. Unfortunately, the legislative history of § 1292(b) provides no illumination on a resolution of these interests."

We consider below the "possible conflict with the policy that government antitrust actions are to be reviewed only in the Supreme Court". Policy means Congressional intent, and that must be gathered in the first instance from statutory language. The supposed "possible policy" referred to in the quotation is derived from the history, purpose and language of interlocutory appeals under what is now 1292(a), and that, as we show by a brief review below, is completely inapplicable.

Purpose of Section 1292(b).

The conclusion mandated by the language is supported by the purpose of § 1292(b). That statute, enacted in 1958, created an entirely new practice. Its genesis and the impetus for its enactment were the recognition that there are unusual situations where an interlocutory appeal will expedite litigation rather than impede it. The Senate Report on the bill that became § 1292 (b) stated:[9]

> "This legislation results from a considerable study by committees of the Judicial Conference. The legislation itself was introduced at the request of the Administrative Office of the United States Courts pursuant to the direction of the Judicial Conference of the United States. * * * The bill results from a growing *awareness of the need for expedition*

9. Senate Report No. 2434, August 18, 1958, 3 U.S. Code Congressional and Administrative News, 85th Cong., 2nd Sess.

of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, result in a final order which would then be appealable to the circuit courts of appeals of the United States. However, such motions, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable".[10] (p. 5256)

* * *

"The committee believes that this legislation constitutes a desirable addition to the existing authority to appeal from interlocutory orders of the district courts of the United States. * * * Any legislation, therefore, appropriately safeguarded, which might aid in the disposition of cases before the district courts of the United States by saving useless expenditure of court time is such as to require the approbation of all those directly concerned with the administration of justice in the United States." (p. 5257).

As a most vivid example of cases calling for interlocutory appeals, the report pointed to antitrust, saying:

"There are many civil actions from which similar illustrations could be furnished. For example, *in an antitrust action* a plea may be entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. *Disposition of antitrust cases may take considerable time,* yet upon appeal following final disposition of such cases the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." (P. 5256).

The genesis and impetus of the Expediting Act are exactly the same, namely, to expedite litigation and not impede it. The Expediting Act was motivated by the view that government antitrust

10. So here; had the district court granted Tidewater's motion to dismiss, its order would have been appealable as final.

cases are of such importance that they should be expedited, *Shenandoah Broadcasting v. Ascap*, 375 U.S. 39 (1963); *United States v. Cities Service Co.*, 410 F.2d 662, 664 (1 Cir. 1969). In reporting the bill that became the Expediting Act, Senator Fairbanks said (36 Cong.Rec. 1679):

> "* * * every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object."

It has been remarked: "The general debate whether section 1292(b) would expedite or delay has been decided by Congress when it adopted that provision. Experience with that section has shown the wisdom of the Congressional decision." 5 Harvard Journ. on Legislation 55, 64 (1967).

The provision about appeals is Section 2 of the Expediting Act. Section 1 of the same Act provided that government antitrust cases would be heard by a panel of judges upon the certificate of the attorney general. This is now 15 U.S.C. § 28, which provides for a panel of three. The House Report on the bill[11] explains this provision by quoting a letter of the attorney general as follows:

> "There are a number of cases now provided by statute where appeals may be made directly to the Supreme Court from the district and circuit courts,
>
> * * *
>
> "The class of cases that I suggest should be brought within this rule, it seems to me, is of as great importance as any of those referred to. The suggested provision requiring a full bench of circuit judges *would insure the cases receiving as full consideration before presentation to the Supreme Court as if heard by the United States circuit court of appeals.*"

Permitting interlocutory appeals under 28 U.S.C. § 1292(b) will serve both the purpose of speeding litigation and of giving the

11. House Report No. 3020, 57 Cong., 2nd Sess., January 9, 1903.

case a screening before issues reach this Court. Thus § 1292(b) and the Expediting Act are animated and informed by precisely the same objectives and warranted by precisely the same circumstances. They should be read together as supplementing each other, not read as antagonistic. And if any repugnancies were present, the later Act would necessarily control all intendments. *United States v. Yuginovich*, 256 U.S. 450, 463 (1921); *United States v. Tynen*, 78 U.S. 88, 92 (1870).

The Contrast With the Language and History of 1292(a)

28 U.S.C. § 1292(a) is derived from the Evarts Act of 1891 (Act of March 3, 1891, 26 Stat. 828, § 7). That Act provided as follows:

> "That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, *in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals*, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: * * *."[12]

Since the Evarts Act, as enacted in 1891 and amended in 1900, provided in as plain language as possible for certain interlocutory appeals to a Court of Appeals only in cases "in which an appeal from a final decree may be taken * * * to the Circuit Court of Appeals", and since the Expediting Act deprived the Courts of Appeals of jurisdiction over appeals from final judgments in government instituted antitrust cases, upon enactment of the Expediting Act the language of the Evarts Act ceased to provide for interlocutory appeals.

Thus, at its birth, the Expediting Act plainly deprived Courts of Appeal of jurisdiction over 1292(a) type of interlocutory

12. By the Act of June 6, 1900, c. 803, 31 Stat. 660, the Evarts Act was amended to extend to orders concerning receivers. The language "in a cause in which an appeal from a final decree may be taken * * * to the circuit court of appeals" remained.

appeals—the only kind then authorized—in government antitrust suits. The debate has turned on whether subsequent textual changes altered the law on 1292(a) appeals.

In 1906 the Evarts Act was amended[13] to substitute the words "in any cause" for the words "in a cause in which an appeal from a final decree may be taken * * * to the Circuit Court of Appeals". Not until the Act had been amended again was the question raised, years later, whether the 1906 change expanded the reach of the Evarts Act. Upon the basis of the history of the peculiar purpose and motivation of the 1906 amendment as being to defeat certain evasive tactics in pleading, and noting that the amendment was enacted only 3 years after the Expediting Act, yet without referring to it, courts concluded that the 1906 amendment was not intended to effect that expansion (see *United States v. Cities Service Company*, 410 F.2d at 666-67).

The phrasing was again changed in 1911 upon codification of various statutes into the Judicial Code. Section 7 of the Evarts Act became Section 129 of the Code (36 Stat. 1087, 1134), and the words "in any cause" were replaced by the words "notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court". The new phrasing did not say "notwithstanding an appeal . . . might, upon final decree . . . be taken *only* to the Supreme Court". In *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 512 (1963), the Third Circuit held that the 1911 change "assuredly had the effect" of making interlocutory injunctive and receivership orders in government antitrust suit appealable to Courts of Appeal. The First Circuit, in the *Cities Service* case, 410 F.2d at 667, held otherwise, because, while "the language is sweeping", there was "no indication that any substantive change in the Expediting Act

13. By the Act of April 14, 1906, 34 Stat. 116.

vas intended. Nor, apparently, was any attempt made to take advantage of the language".

In this state of the statutes, *United States v. California Canneries*, 279 U.S. 553 (1929), was decided. There, long *after* a final decree in a government antitrust suit,[14] California Canneries sought to intervene to move to vacate the final decree. On appeal in 1924 the Court of Appeals for the District of Columbia reversed an order denying intervention. On certiorari this Court held that the Court of Appeals had no jurisdiction. In doing so it added (p. 558):

> "These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins v. Miller*, 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree."

This last clause was dictum, because the order appealed from was *not* interlocutory at all. It was a post-judgment order, and, as such, historically considered a final order for purposes of appeal.[15] Orders denying interventions after a judgment decreeing an acquisition to be illegal are appealable directly to this Court as final orders. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S.

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14 *Swift & Co. v. United States*, 276 U.S. 311 (1928).

15 A decree, like that in *Swift & Co.v. United States, supra*, that an acquisition is illegal and must be undone, is final for appeal to this Court, although a plan of divestiture remains to be ordered. *Brown Shoe Co. v. United States*, 370 U.S. 294, 305 (1962). The subsequent order putting a plan into effect is also appealable as a final order. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129 (1967). So is a subsequent contempt order. *First Security Nat. Bank v. United States*, 382 U.S. 34 (1965). It is the general rule that post-judgment orders are appealable as final orders, unless they too are merely interlocutory to some post-judgment procedure. 9 Moore's Federal Practice (2d ed.) ¶ 110.14 and cases cited.

129, 132 (1967); *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502 (1941). Therefore the order denying intervention to California Canneries in the *Swift* case was obviously not appealable to a court of appeals but only to this Court because it was a final order.

In 1925, 43 Stat. 936, 937, inaugurating this Court's certiorari jurisdiction, re-codified the Judicial Code and deleted the "notwithstanding" clause of Section 129 of the Judicial Code of 1911. According to a memorandum accompanying the bill, the "notwithstanding clause" was "eliminated as having no further application in view of the repeal of the existing provisions of Section 238 providing for direct appeals."[16] This ambiguous explanation left the situation as it had been, that is, in the context of an Act which, when first enacted in 1903, plainly precluded an interlocutory appeal on injunctions to Courts of Appeal. As said in *Cities Service*, at pp. 668-669, "If the 1911 'notwithstanding' language did not create such jurisdiction, then dropping such language because the same coverage could be achieved without it could be no more effective."

The next event was the revision of the Judicial Code in 1948, as Title 28 U.S.C. (62 Stat. 929). The Evarts Act became 28 U.S.C. § 1292(a). As so codified, 1292(a) permits an appeal to a Court of Appeals of interlocutory injunctive and receivership orders "except where a direct review may be had in the Supreme Court". As this Court has review under the Expediting Act only from final judgments, it has none from interlocutory orders. The Third Circuit in *Ingersoll-Rand, supra*, therefore held that the 1948 enactment operated to vest jurisdiction in Courts of Appeals over such interlocutory orders in government instituted antitrust cases. Said it (320 F.2d at 517):

> "In fact, it is extremely difficult and requires doing violence to the language of the statute to escape the conclusion that

16. Cited both in *United States v. Ingersoll-Rand*, 320 F.2d at 512, 513, and *United States v. Cities Service Company*, 410 F.2d at 668-9.

interlocutory orders, such as the one at bar, are reviewable by a court of appeals excepting and only excepting those types of cases in which an interlocutory order is directly reviewable by the Supreme Court."

On the other hand, the First Circuit pointed to the statements in the reviser's notes to the 1948 recodification that no substantial changes were intended, and it cited this Court's decision to the same effect, *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957). Therefore the First Circuit, disagreeing with the Third, held that the 1948 codification effected no change.

In between *Ingersoll-Rand* and *Cities Service*, both containing long discussion, came the decision of the court below in *United States v. FMC Corporation*, 321 F.2d 534 (1963), the basis of its decision in the present case. Without analysis or discussion it stated baldly "We are of the opinion that we lack jurisdiction of this appeal, by reason of the provisions of the Expediting Act of 1903". Its authority for this proposition was the *California Canneries* case. Although it also cited four other decisions of this Court, only one, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), could be deemed to contain anything conceivably relevant,[17] and even that case did not involve any question of appeal

17. The other three were *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944); *United States Alkali Export Association v. United States*, 325 U.S. 196 (1945); and *DeBeers Mines v. United States*, 325 U.S. 212 (1945). None involved an appeal to a Court of Appeals. *Allen Calculator* was an attempt to appeal to this Court an order it held not to be final. The *Alkali* and *DeBeers* cases were attempts to have this Court review interlocutory orders by certiorari to the district court.

The Ninth Circuit's *FMC* opinion also cited three lower court cases. One, *United States v. American Association of Composers, Authors & Publishers*, 317 F.2d 90 (2 Cir. 1963), was promptly reversed in *Shenandoah Broadcasting Co. v. Ascap*, 375 U.S. 39 (1963). Another, *Missouri-Kansas Pipe Line Co. v. United States*, 108 F.2d 614, was a 1939 Third Circuit decision, and the Third Circuit's later decision in *Ingersoll-Rand* holds a 1292(a) order appealable to a Court of Appeals. The third, *National Association of Real Estate Boards v. United States*, 176 F.2d 631 (D.C. Cir. 1949), involved an interlocutory order of a kind not within § 1292(a) or its precursors.

to a Court of Appeals. It was a direct appeal to this Court, and the only question about appealability was whether the appealed order was final. In a footnote, constituting a complete aside, it nearly quoted from *California Canneries* (370 U.S. at 305, fn. 9):

> "Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree *United States v. California Cooperative Canneries*, 279 U.S. 553, 558."

Thus, since the 1948 amendment, on appealability in government antitrust suits of interlocutory orders described in § 1292(a) there is conflict among the circuits, the First and Ninth opposed to the Third. The question has not reached this Court. Inasmuch as the Court of Appeals in *Ingersoll-Rand* (1963) affirmed an interlocutory injunction appealed by the defendant, neither party had any incentive to seek review by this Court of the question of appealability. In the *FMC* case, the district court had denied a preliminary injunction against an acquisition, and the United States appealed to the Ninth Circuit. When that court stated that it lacked jurisdiction, the United States applied to Mr. Justice Goldberg for a stay pending a petition for certiorari. When he denied the stay, the acquisition occurred, thus mooting the question so that no petition for certiorari was filed. In his opinion denying the stay, (*United States v. FMC Corp.*, 11 L.Ed.2d 20) Mr. Justice Goldberg, not writing for this Court but as a single circuit justice, concluded that the 1948 revision of the Judicial Code had not altered the previous historical construction of the Expediting Act.

Even the courts voting against appealability of 1292(a) orders consider that conclusion to be unfortunate[18] but compelled

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18. For example, the First Circuit in the *Cities Service* case, *supra*, remarked (p. 669):

> "We realize that time has made ancient good much less common than it was in 1903, and that requiring Supreme Court review

history. The case against appealability of § 1292(a) orders to a Court of Appeals must rest on the statement in *California Canneries*, repeated in the footnote dictum in *Brown Shoe*. It may be granted that *California Canneries*, although dictum, represented the views of this Court, but the views it represented were in a precise historical context, i.e., the state of the statutory law in 1925. As said in *Ingersoll-Rand* (p. 516):

> "The basis for the Supreme Court's decision as stated in California Canneries is perfectly plain. It was that the Expediting Act amended the prior law and did away with appeals from interlocutory orders and decrees in anti-trust suits."

In short, the Expediting Act was enacted after the Evarts Act, and nothing in subsequent amendments, at least until the 1948 revision; showed any Congressional intention to effect a change. The Third Circuit believed that the 1948 amendment did effect a change; the First and Ninth believed not.

Recapitulation as respects 28 U.S.C. § 1292(b)

We turn back to § 1292(b). Whatever may be said about 1292(a), the case as to 28 U.S.C. 1292(b) is clear. It was enacted 55 years after the Evarts Act and 21 years after *California Canneries*. In *California Canneries* this Court was expressing a judgment on what Congress had done, not on what it could do or on the effect of what it would do 21 years later. While *Brown Shoe* post-dates the enactment of § 1292(b) by about four years, the issue of jurisdiction of a Court of Appeals over an interlocutory appeal under 1292(b) was not involved, and the new Act was not before it. Therefore *Brown Shoe* is no authority on that point. *Webster v. Fall*, 266 U.S. 507, 511 (1925); *Nashville Milk Co. v. Carnation*

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final district court actions in government civil antitrust cases and barring any court of appeals review of interlocutory orders make little sense today. The call for another — and hopefully less ambiguous — change in jurisdiction has been sounded on both the judicial and legislative fronts."

Co., 355 U.S. 373, 376, 383 (1958); *United States v. More*, 3 Cranch (7 U.S.) 159, 172.[19]

28 U.S.C. § 1292(b) is the latest expression of Congressional will. It is plain in its language and requires no interpretation from history.[20] There are no chalk marks on the slate of history to obscure its meaning.

In the court below respondent United States cited *Farbenfabriken Bayer, A.G. v. United States*, 1968 Trade Cas. ¶ 72,570 (D.C.Cir.). While that unofficially reported order does not mention § 1292(b), it does appear to deny appealability to a Court of Appeals under that section. The opinion contains no analysis. It is as follows, in full:

> "On consideration of applicant's application for interlocutory appeal, of respondent's opposition thereto and applicant's reply, it is
>
> "Ordered by the Court that applicant's aforesaid application is denied. *Brown Shoe Co. v. United States* [1962 TRADE CASES ¶ 70,366], 370 U.S. 294, 305 n. 9 (1962); *United States v. California Cooperative Canneries*, 279 U.S. 461 (1929); *National Association of Real Estate Boards v. United States* [1948-1949 TRADE CASES ¶ 62,436], 85 U.S. App. D.C. 165, 176 F. 2d 631 (1949).
>
> "Circuit Judge Burger did not participate in the foregoing order."

As we have seen, the cases cited do not support the conclusion.

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19. Indeed, much the same is true as respects appealability under § 1292(a), for that issue was not involved in *Brown Shoe*, and the effect of the 1948 amendment was not before the Court.

20. *Ex parte Collett*, 337 U.S. 55, 61 (1949): "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco v. Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions."

To permit Courts of Appeal jurisdiction in government antitrust cases over appeals from interlocutory orders of the important and controlling kind to which 28 U.S.C. 1292(b) applies would be an enormous service to this Court in lightening its burden and in enlisting the screening agency of intermediate appellate courts. Congress has given the courts a useful tool in § 1292(b). Its aid in government antitrust cases should not be rejected upon an ambiguous history of another statute. The language of 1292(b) supports jurisdiction, and nothing in the purpose or history of 1292(b) or of the Expediting Act precludes it. The question is important, and it cries for resolution.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

DATED, San Francisco, California, September 8, 1971.

MOSES LASKY

C. LANSING HAYS, JR.

Attorneys for Petitioner

Of Counsel:

BROBECK, PHLEGER & HARRISON
HECHT, HADFIELD, HAYS, LANDSMAN
& HEAD

(Appendices Follow)

Appendix A.

United States Court of Appeals
For the Ninth Circuit

Filed Jul 28 1971

TIDEWATER OIL COMPANY, *Defendant and Petitioner,* vs. UNITED STATES OF AMERICA *Plaintiff and Respondent.* and PHILLIPS PETROLEUM COMPANY, *Defendant and Respondents.*	Misc. 5791

Before: CHAMBERS and HAMLEY, Circuit Judges.

The petition for leave to appeal under § 1292(b) is denied. *United States v. Ford Machinery Corporation*, 9 Cir., 321 F.2d 534.

Appendix B

[Names and addresses of counsel omitted]

United States District Court
Central District of California
Civil No. 66-1154-WJF
Filed: Jun 24, 1971

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY and TIDEWATER OIL COMPANY,
Defendants.

ORDER AND CERTIFICATION FOR INTERLOCUTORY APPEAL UNDER SECTION 1292(b) OF TITLE 28 OF THE UNITED STATES CODE

The motion of defendant Tidewater Oil Company ("Tidewater") for dismissal upon the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater to defendant Phillips Petroleum Company ("Phillips") has long ago been consummated, that no relief is obtainable against Tidewater, and that its presence in the suit is no longer necessary or appropriate, having duly come on for hearing on June 14, 1971; the Court having heretofore denied plaintiff's application for a temporary restraining order, thus permitting Tidewater's sale of assets to Phillips to be consummated, as found by the Court (Findings 5 and 6 entered November 7, 1966) upon denial of plaintiff's motion for a preliminary injunction,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. The motion of Tidewater for dismissal is denied.

2. The Court finds that its order denying defendant Tidewater's motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of

case a screening before issues reach this Court. Thus § 1292(b) and the Expediting Act are animated and informed by precisely the same objectives and warranted by precisely the same circumstances. They should be read together as supplementing each other, not read as antagonistic. And if any repugnancies were present, the later Act would necessarily control all intendments. *United States v. Yuginovich*, 256 U.S. 450, 463 (1921); *United States v. Tynen*, 78 U.S. 88, 92 (1870).

The Contrast With the Language and History of 1292(a)

28 U.S.C. § 1292(a) is derived from the Evarts Act of 1891 (Act of March 3, 1891, 26 Stat. 828, § 7). That Act provided as follows:

> "That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, *in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals*, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: * * *."[12]

Since the Evarts Act, as enacted in 1891 and amended in 1900, provided in as plain language as possible for certain interlocutory appeals to a Court of Appeals only in cases "in which an appeal from a final decree may be taken * * * to the Circuit Court of Appeals", and since the Expediting Act deprived the Courts of Appeals of jurisdiction over appeals from final judgments in government instituted antitrust cases, upon enactment of the Expediting Act the language of the Evarts Act ceased to provide for interlocutory appeals.

Thus, at its birth, the Expediting Act plainly deprived Courts of Appeal of jurisdiction over 1292(a) type of interlocutory

12. By the Act of June 6, 1900, c. 803, 31 Stat. 660, the Evarts Act was amended to extend to orders concerning receivers. The language "in a cause in which an appeal from a final decree may be taken * * * to the circuit court of appeals" remained.

appeals—the only kind then authorized—in government antitrust suits. The debate has turned on whether subsequent textual changes altered the law on 1292(a) appeals.

In 1906 the Evarts Act was amended[13] to substitute the words "in any cause" for the words "in a cause in which an appeal from a final decree may be taken * * * to the Circuit Court of Appeals". Not until the Act had been amended again was the question raised, years later, whether the 1906 change expanded the reach of the Evarts Act. Upon the basis of the history of the peculiar purpose and motivation of the 1906 amendment as being to defeat certain evasive tactics in pleading, and noting that the amendment was enacted only 3 years after the Expediting Act, yet without referring to it, courts concluded that the 1906 amendment was not intended to effect that expansion (see *United States v. Cities Service Company*, 410 F.2d at 666-67).

The phrasing was again changed in 1911 upon codification of various statutes into the Judicial Code. Section 7 of the Evarts Act became Section 129 of the Code (36 Stat. 1087, 1134), and the words "in any cause" were replaced by the words "notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court". The new phrasing did not say "notwithstanding an appeal . . . might, upon final decree . . . be taken *only* to the Supreme Court". In *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 512 (1963), the Third Circuit held that the 1911 change "assuredly had the effect" of making interlocutory injunctive and receivership orders in government antitrust suit appealable to Courts of Appeal. The First Circuit, in the *Cities Service* case, 410 F.2d at 667, held otherwise, because, while "the language is sweeping", there was "no indication that any substantive change in the Expediting Act

13. By the Act of April 14, 1906, 34 Stat. 116.

pinion and that an immediate appeal from that order may
aterially advance the ultimate termination of this litigation.
his Court, therefore, certifies its order denying defendant's
otion to dismiss for interlocutory appeal under Section 1292 (b)
f Title 28 of the United States Code.

Dated: June 24, 1971.

WARREN J. FERGUSON
United States District Judge

[Approvals as to form omitted]

Appendix C

[District Court Caption Omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RE MOTION FOR PRELIMINARY INJUNCTION AND ORDER

On July 13, 1966, plaintiff filed its complaint charging tha the acquisition by Phillips Petroleum Company (hereafter re ferred to as "Phillips") of certain assets from Tidewater O Company (hereafter referred to as "Tidewater"), under a agreement of March 29, 1966 would violate Section 7 of th Clayton Act. Concurrently with the filing of the complain plaintiff filed motions for a temporary restraining order and preliminary injunction enjoining, *pendente lite,* the closing unde the agreement. On July 14, 1966, in circumstances hereafte found, the transaction was closed and consummated. Plainti thereafter requested the Court to enter its order rescinding th agreement between Phillips and Tidewater and requiring de fendants to take all appropriate action for the complete restor tion to Tidewater of the assets pending ultimate resolution o this case on the merits. In the alternative, plaintiff requested th Court to direct Phillips to establish exclusively the Tidewate brand names and trademarks on all retail outlets and other build ings and places from which they have been removed, to operat the acquired assets under the Tidewater brand names and trade marks until final decree, and to take all action necessary t maintain the going concern value of said assets while in Phillip possession, custody or control. The Plaintiff further prayed tha if neither of the foregoing remedies was deemed appropriate b the Court, the Court order Phillips to sell and Tidewater t purchase the assets in question within six months after an ultimat decision on the merits, assuming plaintiff prevails. Plaintiff's mo tion and requests came on to be heard on August 4 and 5, 196

opinion and that an immediate appeal from that order may materially advance the ultimate termination of this litigation. This Court, therefore, certifies its order denying defendant's motion to dismiss for interlocutory appeal under Section 1292 (b) of Title 28 of the United States Code.

Dated: June 24, 1971.

WARREN J. FERGUSON

United States District Judge

[Approvals as to form omitted]

Appendix C

[District Court Caption Omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RE MOTION FOR PRELIMINARY INJUNCTION AND ORDER

On July 13, 1966, plaintiff filed its complaint charging that the acquisition by Phillips Petroleum Company (hereafter referred to as "Phillips") of certain assets from Tidewater Oil Company (hereafter referred to as "Tidewater"), under an agreement of March 29, 1966 would violate Section 7 of the Clayton Act. Concurrently with the filing of the complaint, plaintiff filed motions for a temporary restraining order and a preliminary injunction enjoining, *pendente lite*, the closing under the agreement. On July 14, 1966, in circumstances hereafter found, the transaction was closed and consummated. Plaintiff thereafter requested the Court to enter its order rescinding the agreement between Phillips and Tidewater and requiring defendants to take all appropriate action for the complete restoration to Tidewater of the assets pending ultimate resolution of this case on the merits. In the alternative, plaintiff requested the Court to direct Phillips to establish exclusively the Tidewater brand names and trademarks on all retail outlets and other buildings and places from which they have been removed, to operate the acquired assets under the Tidewater brand names and trademarks until final decree, and to take all action necessary to maintain the going concern value of said assets while in Phillips possession, custody or control. The Plaintiff further prayed that if neither of the foregoing remedies was deemed appropriate by the Court, the Court order Phillips to sell and Tidewater to purchase the assets in question within six months after an ultimate decision on the merits, assuming plaintiff prevails. Plaintiff's motion and requests came on to be heard on August 4 and 5, 1966

The evidence adduced by the plaintiff consisted of an affidavit of Leonard M. Berke, an economist employed by the Antitrust Division of the United States Department of Justice, together with 39 exhibits. The evidence of defendants in opposition consisted of the sworn testimony of George F. Getty, II, President of Tidewater, given in open Court on July 13 and 14, 1966, and received in evidence on this motion by stipulation, and the affidavits of Stanley Learned, President and Chief Executive Officer of Phillips; George F. Getty, II, President of Tidewater; John E. Roth, Senior Vice President of Tidewater; C. C. Tate, Vice President, Manufacturing, of Phillips; H. R. Tomfohrde, Jr., Group Vice President in charge of Manufacturing, Marketing and Transportation of Tidewater; John Getgood, Vice President, Sales, of Phillips (two affidavits); George E. Glatfelder, Assistant to the Vice President, Sales, of Phillips; Charles D. Signorelli, Controller of Tidewater; Herbert F. Richards, President of California Oil Jobbers Association; Jon R. Katzenbach, a principal of McKinsey & Co., Management Consultants; W. J. Forrester, District Director of District No. 1 of the Oil, Chemical and Atomic Workers International Union AFL-CIO; Tom Coll, Supervisor of Contra Costa County; Moses Lasky, a counsel for Tidewater (two affidavits); and S. E. Floren, Assistant General Attorney of Phillips; and exhibits attached to and part of said affidavits. Having considered all the evidence, together with the oral arguments of the parties and their several written briefs, and having, on August 23, 1966, made and filed herein its "Memorandum Opinion In Re Motion for Preliminary Injunction and Order," the Court upon the record before it and for the purposes of this motion only makes the following:

FINDINGS OF FACT

1. Phillips is a corporation organized and existing under the laws of the State of Delaware with its principal offices in Bartlesville, Oklahoma. Phillips is engaged in the production, manufact-

uring and marketing of petroleum and of petroleum products, including motor gasoline.

2. Tidewater is a corporation organized and existing under the laws of the State of Delaware with its principal offices in Los Angeles, California. Tidewater is engaged in the production, manufacturing and marketing of petroleum and of petroleum products, including motor gasoline.

3. On March 29, 1966, defendant Phillips Petroleum Company and Tidewater Oil Company entered into a Letter Agreement for the sale to Phillips of certain manufacturing, marketing, transportation and related facilities of Tidewater's Western Manufacturing and Marketing Division, including a refinery for the manufacture of refined petroleum products located at Avon, California, and service station properties, all of which were located in California, Washington, Oregon, Nevada, Arizona, Hawaii and Idaho. The Letter Agreement provided for payment by Phillips to Tidewater of the sum of $325,000,000, adjusted in accordance with certain specified provisions of the agreement including provision for payment of the value of inventory on hand at the date of the sale. This agreement did not involve any of the assets or activities of Tidewater's Eastern Division, all of which are located on the eastern seaboard of the United States, or any of Tidewater's assets or activities devoted to exploration or production.

4. On the same day, March 29, 1966, the defendants advised the Department of Justice of the transaction, gave it a copy of the agreement, informed it that the transaction would be consumated June 30, 1966, and thereafter supplied all documents and information requested by the Department of Justice to assist it in considering the competitive effects of the intended acquisition.

5. The Letter Agreement called for the completion of the sale on June 30, 1966, but at the request of the Department of Justice, made on June 28, 1966, the completion of the sale was

postponed until 10 A.M., E.D.T., July 14, 1966, by agreement of Phillips and Tidewater. Not until July 13, 1966, did plaintiff reach a decision to oppose the sale, and it filed its complaint and motion on that date.

6. After filing its complaint herein on July 13, 1966, plaintiff, in the afternoon of that day, applied to the Honorable Charles H. Carr, District Judge, for a temporary restraining order to restrain the consummation of the transaction. Judge Carr, without ordering any restraint upon defendants, directed the plaintiff to apply to the District Judge to whom the suit had been regularly assigned upon its filing, and plaintiff did so on July 14, 1966. Although the application did not come on for hearing before this Court until after the hour scheduled for closing of the transaction on that day, defendants, in deference to the Court, delayed the closing of the transaction pending the Court's judicial determination. In the afternoon of July 14, 1966, this Court denied the requested restraining order, thus permitting the transaction to be closed. * * * Thereafter on July 14, 1966, Tidewater and Phillips closed and consummated the transaction provided for by the agreement of March 29, 1966. Tidewater thereby sold and transferred title and delivered possession to Phillips of all the properties and assets which it had agreed and bound itself to do by said Letter Agreement, and, in so doing, acted pursuant to the obligation of the Letter Agreement.

7. Plaintiff alleges and, for purposes of this motion, the Court assumes that the relevant geographical markets here (the "sections of the country") are California and the "five western states" (defined as "the States of California, Oregon, Washington, Arizona and Nevada").

8. The relevant product market (the "line of commerce") is the sale of motor gasoline.

9. Prior to the sale to Phillips, Tidewater's Western Manufacturing and Marketing Division was engaged in manufacturing motor gasoline and other refined petroleum products at its Avon,

California refinery and was engaged in marketing motor gasoline principally in California, in Hawaii, and in Washington and Oregon west of the Cascade Mountains.

10. Prior to the acquisition, Phillips was not engaged in refining or marketing motor gasoline in California or in Washington and Oregon west of the Cascade Mountains or in Hawaii, and had no refinery anywhere in the five western states.

11. There was no actual competition in the sale of motor gasoline between Phillips and Tidewater in the State of California, and any actual competition existing between Tidewater and Phillips in the five western states was of such a minor nature as to be too economically insignificant to come within the prohibition of the Clayton Act.

12. Plaintiff based its contention that the transaction would violate Section 7 on a theory of potential competition, namely that Phillips, if not permitted to acquire Tidewater's Western Manufacturing and Marketing assets and operations, would nevertheless probably enter into the California market at some time in the future and become an actual and significant competitor there, while at the same time Tidewater would continue to be a competitor there or would sell its assets and operations to purchasers to whom plaintiff would have no objection. To determine whether there is such potential competition involves a forecast of probabilities. The evidence presently before the Court fails to support plaintiff's theory of potential competition, both with respect to Phillips probably becoming a competitior in the California market and Tidewater remaining a competitor therein or someone becoming a competitor therein in Tidewater's place by acquisition from Tidewater.

13. While Phillips is a strong, aggressive company which has expanded its marketing of motor gasoline in the mid-continent and to the southeastern and northeastern parts of the country, Phillips' expansion into those areas has been made possible only by the availability of economic pipeline transportation thereto

from its principal refineries, enabling it to expand its marketing operations from town to town, and county to county, and by the availability of economic water transportation. By means of such transportation, Phillips can meet the competition of mid-continent and eastern refiners throughout those parts of the country. Phillips' market extension in the mid-continent has been based upon and has paralled the development of the mid-continent pipeline complex and river barging on the Mississippi and its tributaries. From one or more of its refineries, Phillips can supply refined products, including motor gasoline, competitively to all parts of the mid-continent region. Phillips' market extension to southern and southeastern coastal states has been possible because of the location of Phillps' Sweeny, Texas refinery (purchased from the United States in 1947) on a deep water channel to the Gulf of Mexico and its access to the Plantation pipeline and, later, the Colonial pipeline. Motor gasoline from Gulf Coast Texas refineries can be laid down in the coastal states and inland in the south and southeast at a cost competitive with east coast refiners. Phillips' market extension to the middle-Atlantic and northeastern states has been made possible by the availability of economic water transportation from Sweeny and by the construction of the Colonial pipeline, which carries refined products along a route from east Texas through the south, southeast and middle-Atlantic states to New York harbor. Phillips can compete with east coast refineries all along the pipeline as well as in the northeast.

14. Market extension into California and into Washington and Oregon west of the Cascades presents a totally different kind of problem to Phillips. Of Phillips' total domestic refining capacity of 289,000 barrels per day, 269,000 barrels are accounted for by refineries located at Borger and Sweeny in Texas, at Okmulgee, Oklahoma, and at Kansas City, Kansas. The balance of 20,000 barrels per day is divided between refineries located at Woods

Cross, Utah (15,500 barrels) and Great Falls, Montana (4,500 barrels). There is no products pipeline by which motor gasoline can be transported from any Phillips refinery to the west coast and no one proposes construction of any such pipeline. Motor gasoline cannot be economically transported to the west coast by water from any Phillips refinery. As a matter of economic practicality, there is no way for Phillips to supply service stations on the west coast with motor gasoline from its existing refineries. The mountains and sparsely settled desert and semi-desert make it economically unfeasible to construct a pipeline from any Phillips refinery to the west coast or for Phillips to extend its marketing operations from town to town, and county to county, to the west coast as it has been able to do in other parts of the United States.

15. As a matter of economic practicality, gasoline not refined on the west coast cannot compete with gasoline refined on the west coast. It is essential that a large marketer have a west coast refinery if it is to market motor gasoline there. Phillips cannot compete in the marketing of motor gasoline on the west coast without a west coast refinery.

16. It would not be economically feasible for Phillips to build a refinery in California or elsewhere on the west coast where, apart from the acquisition from Tidewater, it has no service stations through which the output of such a refinery could be sold. The development of the number of service stations and volume of sales necessary to support a refinery of economic size would be a project entailing many years of effort and loss.

17. Conversely, it would not be economically feasible for Phillips to develop any substantial number of service stations for the marketing of motor gasoline on the west coast without having a refinery to supply such gasoline. Any attempt by Phillips to do so, even assuming it could obtain the necessary supplies of motor gasoline and other refined products from west coast refineries, would result not just in a low rate of return on heavy capital investment, but in continuing losses for the foreseeable future.

18. Any attempt by Phillips to come to the west coast on a unilateral or grass roots basis would be a costly and unprofitable venture for Phillips.

19. Phillips has never had any intention, expectation, program or plan of any kind to attempt by unilateral entry or internal expansion to market motor gasoline in California or in Washington or Oregon west of the Cascades. The only time that Phillips has expanded into any area without the availability to it of pipeline or economic water transportation from its existing refineries was when it entered into eastern Washington and Oregon and the Intermountain area, but this it did by acquisition from others of already established manufacturing and marketing facilities eighteen years ago. Despite having the desire to expand further and enter the west coast market, it has never attempted in those eighteen years to do so by unilateral entry, and it has never indicated any intention to do so other than by an acquisition such as is involved in this case. Phillips' management has not regarded further westward expansion on a unilateral basis as acceptable from an economic point of view.

20. If the transaction between Phillips and Tidewater were prevented, Tidewater would discontinue manufacturing and marketing in California and the west. Tidewater has been losing ground as a marketer of gasoline in the west, and its projections and analyses indicate it will lose further ground in the future.

21. In the ten year period, 1956 through 1965, Tidewater's operations in its Western Manufacturing and Marketing Division resulted in a cash flow deficiency, after capital expenditure requirements, of $93.5 million, and in a net loss. In the five years, 1961 through 1965, the operation of Tidewater's Western Manufacturing and Marketing Division lost Tidewater a net of $12.6 million with losses in four of the five years and with a profit in the other year of but 2.4% on the book investment. A comprehensive study made by Tidewater in 1965 and completed in October

1965 projected and concluded that in 1970 the Western Manu facturing and Marketing Division's net income would only b $1.1 million, which would constitute a return of but 3/10ths o 1% on the investment in manufacturing and marketing. In th same study it was estimated that Tidewater would have to spen as much as $50 million on facilities just to maintain its existin marketing outlets, but that with these existing outlets, maintaine at the cost of this additional investment. Tidewater's share o motor gasoline sales in the west would decline by 33⅓%. Tide water further estimated that any effort to maintain an acceptabl share of the market in California would require by 1970 a capit outlay of approximately $190 million for service stations, distri bution facilities, and refinery maintenance, and Tidewater furthe concluded that it was highly problematic whether these expend tures would be effective.

22. Tidewater's share of the gasoline market in the states i which its Western Manufacturing and Marketing Division ope ated had been steadily dwindling. From 1960 through 1965 dwindled 31.3% in California, 24.6% in Washington, 25% i Oregon, 29.7% in Nevada and 61.1% in Arizona. The numbe of service stations owned or leased by it and the number of servic stations selling its branded gasolines, other than those owned o leased by it, also declined substantially in California and in th five western state area. Including service stations both owned an leased by Tidewater and stations selling Tidewater's brande products, the declines from 1960 through 1965 were 12.1% i California, 16.1% in the whole of Oregon, 37.4% in Oregon ea of the Cascades, 12.6% in the whole of Washington, 18% i Washington east of the Cascades, 14.6% in Nevada, and 57.1% in Arizona. During the same period the motor gasoline sales o Tidewater's Western Manufacturing and Marketing Division d clined not only relatively but in absolute gallonage despite larg population increases in the western states which resulted in sharp increase in total gallonage consumed.

23. Conversely, Tidewater has been successful in the production of crude oil, and by far the greatest percentage of its profit has been derived from such production. In this connection, Tidewater has been one of the pioneers and leaders in secondary recovery methods, that is, the recovery of crude oil by methods other than the natural energy mechanism of the reservoir. Primarily as a result of its success with secondary recovery techniques, estimates of Tidewater's net recoverable crude oil reserves in California have risen from 228,000,000 barrels in 1963 to 796,000,000 barrels in 1965. This program, however, is costly, and it is estimated that additional capital outlays of $74,416,000 will be required for this program between now and the end of 1970 and that over the next ten years capital requirements will exceed $112,000,000. In 1965, although only one-third of Tidewater's assets were invested in domestic exploration and production, that one-third accounted for $63.97 million of net income, whereas all of Tidewater's other operations as a whole produced in the aggregate losses and reduced the total net income to $56.5 million. In the first half of 1966, domestic exploration and production generated $33.7 million of net income out of total net income of $37.4 million. Each dollar invested by Tidewater in domestic exploration and production produced 8 times as much income as each dollar invested in its Western Manufacturing and Marketing operations. It was Tidewater's judgment that it would rather devote its resources to these operations of exploration and production than to any effort of trying to protect and improve its declining and ailing position as a refiner and marketer. Tidewater had no disposition to invest the great amount of capital required even to maintain its status quo as a West Coast marketer. Its management, confronted with the choice of making large additional investments in manufacturing and marketing in the West, or, in the alternative, concentrating its energies and resources on exploration and production, came to the fixed conclusion that it would

leave the field of refining and marketing in the West and becom
solely a producer.

24. To that end Tidewater was resolved to break up an
junk the refinery at Avon, if necessary. Tidewater could sell o
its service station sites as real estate either at a profit over thei
value as service stations or at no loss in view of the burgeonin
population in the West Coast States, particularly Californi
While Tidewater would doubtless realize less than its investmen
for its refinery, if broken up, Tidewater was convinced that i
could invest the proceeds elsewhere at so vastly a greater rate o
return as to make this course highly desirable. Thus, if th
acquisition by Phillips were prevented, Tidewater's Weste
Marketing and Manufacturing Division would have had goo
reason to cease marketing and manufacturing, by one way o
another, and it set a goal of one year in which to do so.

25. Tidewater has been unable to find any desirous of pu
chasing its Western Manufacturing and Marketing assets
a whole and able to do so. It has tried without success to enli
other buyers, including British Petroleum Company, Ltd., Ge
Oil, Standard Oil Company (Indiana), American Petrofina, In
Shaheen Natural Resources Company, Inc., and a French com
pany. The efforts of Humble Oil and Refining Company to bu
such assets in 1963 were blocked by a government antitru
action.

26. Phillips' acquisition will not adversely affect the supp
of gasoline to the independent marketer. If Tidewater breaks u
the Avon refinery, as the Court finds it would do, that refine
would cease to be a source of supply for independent marketer
On the other hand, under Phillips' ownership, the refinery wi
continue to be a source of supply for independents. Phillips wi
continue to supply them under existing supply contracts assum
from Tidewater, it has no intention of refusing to renew su
contracts, and it will seek the business of independent marketer
in the west as it does elsewhere. It has been Phillips' practice f

many years to supply products from its refineries to independent marketers. Phillips plans to enlarge the capacity of the Avon refinery, thus increasing its total supply of motor gasoline available for sale. Herbert F. Richards, President of the California Oil Jobbers Association, testified that the independent oil jobbers on the west coast believe, and the Court finds, that the substitution of Phillips for Tidewater will increase supplies of gasoline for independents and will increase competition in the oil industry.

27. Many third parties not before the Court were involved in the sale transaction. As a part of the completion of the sale, Phillips committed itself to issue notes in the aggregate principal amount of $200,000,000 due on July 1, 1991, and thirty-five lenders committed themselves to buy such notes. As a further part of the completion of the sale, Phillips assumed obligations of hundreds of leases on service station sites which had theretofore been leased by Tidewater, individual consents having been negotiated and obtained from each landlord for the substitution of Phillips for Tidewater as lessee. There were more than 1000 cases of transfer of property or contract interests from Tidewater to Phillips in which executed written consents were necessarily obtained from interested individuals, corporations and governmental agencies. Phillips assumed indebtedness of Tidewater and its subsidiaries and affiliates in the total amount of $39,060,064.18, significantly altering the rights of the creditors involved. Tidewater's agreements with labor unions were renegotiated to bring employees covered by those agreements under Phillips' welfare and pension plans and other changes were effected in the bargaining agreements. The conditions of employment of many Tidewater personnel not members of any collective bargaining unit were also altered. The rights of these third parties who are not before the Court would be seriously affected by the granting of any relief which would set aside the sale.

28. Since the closing of the transaction Phillips has either spent or contracted to spend several million dollars in the development of the marketing phases of its business on the West Coast resulting from the acquisition.

29. If the sale to Phillips were undone, with the consequent closing of the Avon refinery and discontinuance of Tidewater's Western Manufacturing and Marketing operations, as found above, incalculable and irreparable harm would be inflicted upon Tidewater's thousands of employees by loss of employment, upon its dealers by loss of livelihood, upon the County of Contra Costa and the City of Concord by loss of payroll and tax revenues, and upon the Mount Diablo Unified School District by loss of tax revenues.

30. Undoing the transaction before trial on the merits might prevent the acquisition from ever being consummated even if it should be found to be valid and permissible under Section 7 (a) because economic and market conditions at that time might well be such as to make the acquisition by Phillips impossible or (b) because of the probability that in the interim prior to trial Tidewater would lose dealers and important personnel and its assets would become so diminished in value to Phillips as to make the transaction undesirable from Phillips' standpoint.

31. There is no reasonable probability that absent the acquisition Phillips would enter into the west coast area by unilateral or "grass roots" development. The probabilities are that if Phillips were not permitted to acquire and keep Tidewater's Western Manufacturing and Marketing assets and operations, it would not at any time in the foreseeable future enter into or become a competitor in that area.

32. There is no reasonable probability that Tidewater would remain a manufacturer or marketer in the west if the sale to Phillips were prevented or undone. If the transaction with Phillips were to fail, Tidewater's Western Manufacturing and

Marketing Division would cease to exist in the near future, and Tidewater would vanish as a competitive entity in the western states, and the operations and assets themselves would vanish as a competitive entity.

33. There is no reasonable probability that the acquisition by Phillips will lessen competition or tend to create a monopoly in any line of commerce in any section of the country. On the contrary, Phillips will be a strong competitor and it is probable that the acquisition will promote competition in motor gasoline in California and in the five western states.

34. There is no reasonable probability that the plaintiff will prevail on the merits in a trial of this case.

35. The following conclusions of law, insofar as they may be considered findings of fact, are found by this Court to be true in all respects.

From the foregoing findings of fact the Court makes the following:

CONCLUSIONS OF LAW

1. The Court concludes in all respects as set forth in the foregoing findings of fact.

2. This Court has jurisdiction to prevent and restrain violations of Section 7 of the Clayton Act, and therefore has jurisdiction to act upon plaintiff's motion.

3. The motion for preliminary injunction should be and is hereby denied.

4. Without reaching the question whether the Court has power to order rescission of the agreement or to require Tidewater to reacquire the assets from Phillips, the facts as found would not support exercise of such a power even if it existed. Therefore plaintiff's request that the Court order a rescission of the agreement of March 29, 1966, or a restoration to Tidewater of the assets pending ultimate resolution of the case on the merits should be and is denied.

5. Plaintiff's alternative prayer that Phillips operate under the Tidewater brand names and trademarks and establish exclusive the Tidewater brand names and trademarks on all retail outle and other buildings and places from which they have been re moved and to take all action necessary to maintain the going concern values of said assets while in the possession, custody or control of Phillips must likewise be and is denied.

6. Plaintiff's request that this Court now declare what kind of relief it will direct if plaintiff should eventually prevail upon the merits after a full trial should be and is hereby denied.

ORDER DENYING PRELIMINARY INJUNCTION

In accordance with the foregoing findings of fact and conclu sions of law, it is ordered, adjudged and decreed that plaintiff's motion for a preliminary injunction filed July 13, 1966 and all other requests by plaintiff for a preliminary relief be and the same are hereby denied.

Dated: November 1, 1966.

FRANCIS C. WHELAN
United States District Judge

[Acknowledgment of service omitted]

Appendix D

[District Court Caption Omitted]

Civil No. 66-1154-WJF

NOTICE OF MOTION BY TIDEWATER OIL COMPANY FOR DISMISSAL

To Plaintiff, to Defendant Phillips Petroleum Company, and to Their Respective Counsel of Record:

PLEASE TAKE NOTICE, hereby given, that on Monday, April 26, 1971, at 10 o'clock in the morning, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable William J. Ferguson, United States District Judge, United States Courthouse, 312 North Spring Street, Los Angeles, California, defendant Tidewater Oil Company will move for dismissal, on the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillps Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Compony, and that its presence in the suit is no longer necessary or appropriate. The motion will be based on all papers on file herein, the attached Affidavit of R. D. Copley, and the accompanying memorandum.

Dated: April 8, 1971.

MOSES LASKY
BROBECK, PHLEGER & HARRISON
C. LANSING HAYS, JR.
HECHT, HADFIELD, HAYS, LANDSMAN & HEAD
R. D. COPLEY, JR.

By /s/ MOSES LASKY
Attorneys for Defendant Tidewater Oil Company.

[Affidavits Omitted]

Appendix E.

United States District Court
Central District of California

Honorable Warren J. Ferguson, Judge Presiding

No. 66-1154-F

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

PHILLIPS PETROLEUM CO., et. al., *Defendants.*

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California
Date: Monday, June 14, 1971
Pages: 1 through 25

* * *

[Tr. 4]

The Court: Mr. Murphy.

The Clerk: No. 15 on the calendar, case No. 66-1154-F United States of America versus Phillips Petroleum Company, et al., hearing Defendant Tidewater's motion to dismiss and for preliminary pretrial conference.

Would you state your appearances, please.

Mr. Lasky: Moses Lasky for the defendant Tidewater the moving party.

* * *

[Tr. 5]

The Court: Let's get the other appearances, shall we, first.

Mr. Duvall: Melvin J. Duvall and William S. Farmer for the United States.

Mr. Clary: If your Honor please, Everett B. Clary, William Peel [iel] and John Dickey for the Defendant Phillips Petroleum.

* * *

[Tr. 23]

The Court: I am going to deny the motion, Mr. Lasky. I feel that there is sufficient authority in the law and sufficient power in the court to keep Tidewater as a defendant, a party defendant.

However, I do recognize that the course of the trial will depend upon the correctness of my ruling.

And therefore I will issue an order making my ruling appealable.

Mr. Lasky: Then we will take a prompt interlocutory appeal.

The Court: Because if you are in that is one type of a lawsuit and if you are out that is another kind of lawsuit.

Mr. Lasky: We will take a prompt interlocutory appeal with your Honor's permission.